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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LAKENDRA MCGOWAN,

Defendant and Appellant.

D075013

(Super. Ct. No. SCD279010)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed in part and remanded with directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Robin Urbanski and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Lakendra McGowan pleaded guilty to felony vandalism (Pen. Code,<sup>1</sup> § 594, subds. (a), (b)(1); count 2) and misdemeanor recklessly causing a fire (§ 452, subd. (d); count 3). Count 1 was dismissed.

Consistent with the plea agreement, the court placed McGowan on three years formal probation, subject to serving 180 days in jail. Certain fines, fees and assessments were also imposed.

McGowan appeals challenging only the fines, fees and assessments imposed. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), McGowan contends the case must be remanded to permit the court to conduct a hearing on her ability to pay the fines, fees and assessments. The People agree, in part. The People agree the issue was preserved by McGowan's request for reduced or stayed fees to be imposed claiming she did not have the ability to pay any amount. The People agree the court must hold a hearing on her request except for the punitive fines. As to those fines, the People argue ability to pay is not relevant. Thus, the parties agree the non-punitive fees and assessment must be re-evaluated after determining McGowan's ability to pay such amounts. Their dispute then is narrow: Should the court also remand the case for a hearing on her ability to pay the restitution fine? We hold that the trial court on remand must allow McGowan to present evidence on her ability to pay any fines, fees or assessments. Our conclusion does not imply an opinion as to how the court should use that information. Nor does our remand indicate we endorse the reasoning of *Dueñas* or

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

that the court should follow *Dueñas* in its determination as to the imposition of fines and fees.

This limited remand discussion is not the place for a full debate on the validity of the *Dueñas* opinion or how the court should apply it on remand. However, given the potential for misunderstanding of the implications of our remand, we will briefly discuss our reservations regarding how the *Dueñas* opinion might impact how the trial court should conduct its review on remand.<sup>2</sup>

#### A. Background.

At the sentencing hearing, defense counsel made a plea to the court to stay, reduce or eliminate fines and fees because McGowan lacked the ability to pay them. McGowan, with six children, was unemployed and lived on welfare. The court did not specifically address the issue of ability to pay. Ultimately, the court imposed the following fines, fees and assessments: 1) a \$220 state penalty assessment (§ 1465.7, subd. (a)); 2) \$80 court operations assessment (§ 1465.8); 3) \$154 criminal justice administration fee (Govt. Code, § 29550 et seq.); 4) \$60 criminal conviction assessment (Govt. Code, § 70373); and 5) \$300 restitution fine [the minimum], plus a \$30 county collection fee (Pen. Code, § 1202.4, subds. (b) and (i)).

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<sup>2</sup> Given the very narrow issue presented by this appeal we will omit the traditional statement of facts.

In addition to the fines, the court imposed a \$570 assessment for attorney's fees; \$1,433 for presentence investigation and "up to \$176 per month for probation supervision."

#### B. Scope of the Remand

We agree with the parties that McGowan has preserved the issue of her ability to pay fines, fees and assessments. We also agree that since she has preserved the issue she is entitled to have the court conduct a hearing, determine what her ability to pay might be and impose such fines, fees and assessments, if any, as may be just in light of the findings.

At the hearing on remand, McGowan will bear the burden of producing evidence on her ability to pay any of the amounts previously imposed. We disagree with *Dueñas* that the ability to pay must be limited to the defendant's "present" ability to pay. The court should attempt to determine her financial circumstances and her ability to pay some amount within a reasonable period of time. We do not offer any opinion on the amounts, if any, that should be imposed on the non-punitive assessments or fees.

#### C. The Restitution Fine

For purposes of this limited remand we do not believe the court should rely on the due process clause to analyze the validity of the punitive restitution fine. (§ 1202.4) We believe the court should look instead to the more specific constitutional provisions of the Eighth Amendment excessive fines clause for guidance. (*Graham v. Connor* (1989) 490 U.S. 386, 394-395.) Our direction to consider the fines in light of the Eighth Amendment does not make the determination of ability to pay irrelevant. Rather, ability to pay is one

of several factors the court must consider where a fine is challenged under the excessive fines clause. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1320-1322; *People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728.) Finally, we emphasize the determination of a defendant's ability to pay fines or fees is not limited to the person's "present" ability to pay the amounts on the day of sentencing. Rather, the court must consider the defendant's economic circumstances and possibilities for future employment over a reasonable period of time after sentencing.

#### DISPOSITION

That portion of the probation order assessing monetary amounts for punitive and non-punitive fines, fees and assessments is vacated. The case is remanded to the trial court with directions to conduct a hearing at which McGowan will have the opportunity to present evidence of her ability to pay any or all of the amounts assessed. The trial court is directed to make findings regarding McGowan's ability to pay and reconsider the

amounts previously imposed as may be appropriate. We express no opinion as to what conclusions the trial court should reach. In all other respects the judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

HALLER, J.

I CONCUR IN THE RESULT:

AARON, J.